TETUAN K MANO & ASSOCIATES v. LIM KIEN SENG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[ORIGINATING SUMMONS EX PARTE NO: WA-17D-47-11-2016]
25 OCTOBER 2017

LIMITATION: *Accrual of cause of action – Claim – Claim for legal fees by solicitor – Solicitor appointed through letters of appointment – Contractual terms in letters that solicitors would be paid fees for legal work of representing clients – Termination of solicitor's services – Whether claim for fees time-barred – Whether claim founded on contract – Date cause of action accrued – Whether claim statute-barred – Limitation Act 1953, s. 6*

LEGAL PROFESSION: *Solicitor – Fees – Application to tax bills of costs on solicitor-client basis – Claim for legal fees – Solicitor appointed through letters of appointment – Contractual terms in letters that solicitors would be paid fees for legal work of representing clients – Termination of solicitor's services – Whether claim for fees time-barred – Whether claim founded on contract – Accrual of cause of action – Whether limitation had set in – Limitation Act 1953, s. 6 – Legal Profession Act 1976, s. 126*

Via two letters issued in 2005, the applicant was retained by the first and second respondents to act for them in (i) legal proceedings initiated against them in their capacity as directors; and (ii) their personal capacity as defendants in several suits. The contractual term in the said two letters was that the applicant would be paid legal fees for the legal work of representing the respondents in the legal proceedings. However, the respondents terminated the applicant's services with immediate effect in 2011. The applicant issued a summary of bills and later, the performa invoices for their legal fees, costs and expenses incurred for representing the respondents. When the respondents failed to pay the legal fees, the applicant filed the present application in 2016 for an order that the bills of costs be taxed on a 'solicitor and client' basis pursuant to s. 126 of the Legal Profession Act 1976 ('the LPA'). Objecting to this application, the first and second respondents submitted that (i) the applicant's claim for his fees was time-barred under s. 6 of the Limitation Act 1953 ('the LA') which provides that an action founded on contract shall not be brought after the expiration of six years from the date on which the cause of action accrued; (ii) based on the applicant's proposed bill of costs, the conclusion date for each case was stated as 23 October 2010; (iii) taking the cause of action to run from 23 October 2010, limitation had set in on 22 October 2016; and (iv) as the present application was filed on 21 November 2016, the first and second respondents averred that it was statute-barred under s. 6 of the LA and must be dismissed. On the other hand, the third respondent raised the objection that this application was time-barred by s. 126 of the LPA.

Held (allowing application):

(1) The relationship between the applicant and the respondents were governed by the two letters issued in 2005. Since the relationship between the applicant and the respondents were that of a client and his lawyer, which was a contractual relationship, the same was subject to s. 6 of the LA. (paras 15 & 16)

(2) There was no clear evidence on the conclusion of the matter or the disposal of the assets of the company. However, the applicant's service was terminated on 22 March 2011. As at the date of the termination, there were still legal fees not paid. This was admitted by the respondents and they had requested for taxation of the bills pursuant to s. 126(3) of the LPA. Since the respondents have not paid all the legal bills as at the date of the termination, this constituted a breach of the contract between the applicant and the respondents. As such, the limitation period ran from the date of the breach, that was termination of the contract without full payment of the legal fees. Since the application was filed within six years from the date of termination/breach of the contract on 22 March 2011, this application was not statute-barred as limitation had only set in on 21 March 2017. (paras 19 & 20)

(3) Section 126(1) of the LPA clearly states that an advocate and solicitor may apply for the taxation of the bill after the expiration of one calendar month, and within a year from the delivery of the bill of costs. The applicant delivered the bill to the respondents on 16 March 2012. The third respondent submitted that the one-year period ended on 15 March 2013 for the applicant to apply for an order of taxation and since this application was only filed on 21 November 2016, this application was time-barred under s. 126(1) of the LPA. However, the factual matrix of this case fell within s. 126(3) and not under s. 126(1) of the LPA. (paras 26-28)

(4) Section 126 of the LPA allows interested parties to apply for an order for the taxation of a bill of costs. This is when the parties could not agree to the amount in the bills. Section 126(3) provides that where an advocate and solicitor and his client consent to a taxation of a solicitor's bill, the Registrar may proceed to tax the bill notwithstanding that there is no order therefor. The respondents have requested for the taxation of the said bills pursuant to s. 126(3) of the LPA. They could not object to the same now by seeking refuge under s. 126(1) of the LPA and submitting that this application was time-barred. The third respondent was now estopped from raising an objection under s. 126(1) of the LPA. (paras 28-30)

Case(s) referred to:
Abbas & Ngan lwn. Affin Bank Bhd [2010] 1 LNS 1082 HC ***(refd)***
Coburn v. Colledge [1897] QB 702 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6
Legal Profession Act 1976, ss. 124(1), 126(1), (3)

Solicitors Act 1843 [UK], s. 37

For the applicant - Shailender Bhar & K Manoharan; M/s K Mano & Assocs
For the 1st & 2nd respondents - Sandosh Anandan; M/s Culaz & Assocs
For the 3rd respondent - Wong Rhen Yen; M/s Dennis Nik & Wong

Reported by Najib Tamby

JUDGMENT

Azizah Nawawi J:

Application

[1] The applicant's originating summons is for an order that the bill of costs between the applicant and the respondents be taxed on a 'solicitor and client' basis pursuant to s. 126 of the Legal Profession Act 1976 (the 'LPA 1976').

[2] The grounds of the application are that the applicant's legal service was terminated by the respondents and the performa invoices for all the works that have been executed until 2011 was served on the respondents, and the respondent had, through their solicitors M/s Culaz & Associate requested for the bills to be taxed.

[3] Having considered the application and the submission of all parties, this court has allowed the applicant's application with costs.

The Salient Facts

[4] The applicant's firm was retained by Patent View Development Sdn Bhd to act for them in legal proceedings initiated against them by various third parties. The said appointment was made by the directors of Patent View, Lim Kian Seng and Lim Kian Peet. The said letter, *inter alia*, reads:

> ... We hereby confirm ... that the **Company undertakes and guarantees the payments of your legal fees, disbursement and costs with regards to your firm representing the Company in all legal proceedings** …
>
> It was further agreed … that the Legal Fees and Costs to be paid to your Firm … **shall be paid by the Company upon the disposal of the aforesaid matters and/or the disposal of the assets of the Company whichever is earlier** … notwithstanding, the predetermination of the services of your firm by ourselves.

A In the event the Company is unable to pay the said outstanding fees due and owed to your firm, then in such event we as the Directors hereby jointly and severally, and expressly undertake and guarantee the payment of the said Fees to your firm upon discharge and disposal of the matters and/or disposal of the assets of the Company, whichever is the earlier. (emphasis added)

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[5] The directors of the company had also appointed the applicant to represent them as their solicitors in their personal capacity as defendants in several suits *vide* the letter of undertaking issued by the directors in 2005. The said letter of undertaking, *inter alia*, reads as follows:

C We … hereby confirm ... that we **undertake and guarantee the payment of all legal fees and costs due and owed to your firm** … for representing us in the aforesaid legal proceedings and the said Fees shall be inclusive of all Consultation charges for the said matters but excluding disbursements and out of pocket expenses.

D ….

We further undertake and guarantee the payment of the aforesaid fees upon the disposal of *all the aforesaid matters including other matters related to the issues but not specifically set out and/or upon the extraction of the Letters of Administration notwithstanding, the predetermination of the services of your firm by ourselves*. (emphasis added)

E

[6] By a letter dated 22 March 2011, the respondents terminated the services of the applicant with immediate effect.

[7] By a letter dated 4 April 2011, the respondents' solicitor Culaz & Associates, informed the applicant that he has received instructions from the F respondents to continue handling the 'matters involving Lim Kien Seng, Lim Kian Peet and Patent View Development Sdn Bhd'. The said letter, *inter alia*, reads:

...

G In order to expedite our representation, we enclose herewith our first Notice of Change of Solicitors for Suit No: D7-26-9-2006.

In the meantime, **we would appreciate if you could let us have a list of pending matters and dates both in the High Court and Court of Appeal to enable us to cross refer with our clients' records**.

H As regards **to your balance of fees and costs**, we have been instructed by our clients to **request from you the final account of fees paid to date and the balance payable for their verification**. (emphasis added)

[8] In response to the applicant's letter dated 19 October 2011 issuing the summary of bills, the respondents' solicitor replied as follows:

I …

In connection to this matter, our instructions are to request for a detailed bill on all files and the Invoices related thereto to be forwarded to us to enable us to take our clients instructions in this matter.

[9] In response, *vide* a letter dated 16 March 2012, the applicant firm issued the performa invoices for their legal fees, costs and expenses incurred for acting as solicitor and counsel for the legal work to the respondents.

[10] In a letter issued by the respondents' solicitor dated 2 April 2014, the respondents dispute both the principle and quantum of cost charged and states that:

> ... Our instructions are therefore to enquire as to whether you consent to the **taxation of the said bills pursuant to Section 126(3) of the Legal Profession Act 1976**, thus negating the necessity to obtain an order of court for that purpose. (emphasis added)

[11] When the respondents failed to pay the legal fees, the applicant filed this application pursuant to the LPA 1976 on 21 November 2016.

The Findings Of The Court

[12] The first and second respondents objected to this application on the basis that the applicant's claim for his fees is time-barred under s. 6 of the Limitation Act 1953, which provides that an action founded on contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

[13] The first and the second respondents relied on the case of *Abbas & Ngan lwn. Affin Bank Bhd* [2010] 1 LNS 1082, where the High Court dealt with s. 124(1) of the LPA 1976 which is *pari materia* with s. 37 of the Solicitors Act 1843 referred to in the case of *Coburn v. Colledge* [1897] QB 702. The court then applied the principle in *Coburn v. Colledge* and held that the cause of action runs from the completion of the works:

> Isu bilakah kausa tindakan bermula apabila merujuk kepada Seksyen 37 Solicitors Act 1843 telah di ulas dan diputuskan di dalam kes *Coburn v. Colledge* [1987] QB 702 yang berbunyi:
>
> > The question is really whether the time within which an action such as this may be brought runs from the completion of the work or from the expiration of one month from the delivery of the bill of costs under s. 7 of the Solicitors Act, 1843. If it runs from the completion of the work, the defendant must succeed. If it runs from the expiration of one month from delivery of the bill, the plaintiff must succeed ...
> >
> > It was contended for the defendant **that the cause of action in this case arose as soon as the work was completed. I am of the opinion that this contention is correct** for these reasons ...
> >
> > Section 37 of the Solicitors Act, 1843, appears to me to assume that there is a cause of action, and merely to postpone the bringing of an action upon it until the period of one month from the delivery of the bill. There is nothing in the section, so far as I can see, inconsistent with the view that the cause of action arises when the work is completed. It was urged that, if this construction were

> adopted, a solicitor would have shorter time during which he may abstain from bringing his action for work done that the rest of Her Majesty's subjects. This may be so; but on the other hand, if the Plaintiff's contention is correct, the solicitor may abstain from delivering his bill for twenty years, and then at the end of that time he may deliver and sue after the expiration of a month from its delivery. It seems to me would be a very anomalous and inconvenient result ...
>
> (emphasis added)

[14] Applying the case of *Abbas & Ngan (supra)*, the first and second respondents submit that from the applicant's proposed bill of costs, the conclusion date for each case is stated, the last date being 23 October 2010. Therefore, taking the cause of action to run from the last concluded date of 23 October 2010, limitation sets in on 22 October 2016. As this application was filed on 21 November 2016, the first and the second respondents submit that this application is statute barred under s. 6 of the Limitation Act 1953 and must be dismissed.

[15] It is not in dispute that the relationship between the applicant and the respondents are governed by the two letters issued in 2005. The contractual terms in the said two letters are that the applicant will be paid legal fees for the legal work of representing the respondents in the legal proceedings.

[16] Therefore, since the relationship between the applicant and the respondents, that is between a client and his lawyer, is a contractual relationship, the same is subject to s. 6 of the Limitation Act 1953.

[17] In the case of *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32, the Federal Court held that for the purposes of limitation, in the case of actions founded on contract, time begins to run from the breach. At p. 34/D-F Gill FJ held:

> ... Now, what makes possible an action founded on a contract is its breach. **In other words, a cause of action founded on a contract accrues on the date of its breach**. Similarly, the right to sue on a contract accrues on its breach. In the case of **actions founded on contract, therefore, time runs from the breach**. (emphasis added)

[18] The contractual arrangement between the parties is that the applicant was to be paid the legal fees upon the disposal of the legal matter, including other matters related to the issues. Under the term of the appointment letter in 2005, the applicant is to be paid legal fees upon the disposal of the legal matters and/or the disposal of the company assets, whichever is earlier.

[19] There is no clear evidence on the conclusion of the matter or the disposal of the assets of the company. Be that as it may, the service of the applicant was terminated on 22 March 2011. However, as at the date of termination, there are still legal fees not paid. From the documents before

this court, the letter dated 4 April 2011 and 18 November 2011 issued by the solicitors of the respondents, the respondents have admitted that some legal fees are still not paid. *Vide* the letter dated 2 April 2014, the respondents have requested for a taxation of the bills pursuant to s. 126(3) of the LPA 1976.

[20] Therefore, I am of the considered opinion that since the respondents have not paid all the legal bills as at the date of the termination, this constitutes a breach of the contract between the applicant and the respondents. As such, the limitation period runs from the date of the breach, that is termination of the contract without full payment of the legal fees. Since this application was filed within six years from the date of the termination/breach of the contract on 22 March 2011, then this application is not statute-barred as limitation only sets in on 21 March 2017.

[21] The facts of this case is distinguishable from the case of *Abbas & Ngan (supra)* as in that case there is only one bill for professional fees in respect of works that was completed around 24 October 1995. The bill was only issued on 27 November 2004, about nine years after the completion of the works.

[22] In the present case, it is not very clear if all the works were completed because:

(i) the letter dated 4 April 2011 from the solicitors of the respondents to the applicant clearly shows that the solicitors have been appointed to 'continue handling the aforesaid matters';

(ii) a request for a list of pending matters and dates of cases in the High Court and the Court of Appeal;

(iii) there is also a 'notis penukaran peguamcara' filed in respect of petition D7-26-9/2006, which shows that some of the cases have not been concluded; and

(iv) that from the letter of undertaking (2005) the applicant is also to deal with "matters related to the issues but not specifically set out".

[23] Added to that, unlike the case of *Abbas & Ngan (supra)*, there is the issue of termination of the contract, where the respondents have agreed that payments of some professional bill are still pending. Therefore, in *Abbas & Ngan (supra)* where the works have been concluded without the payment of the bills, the cause of action arise from the conclusion of the works. In our case, the works have not been concluded, but the applicant's contract for service was terminated. Thus, the cause of action accrues from the breach of the contract, namely the termination of the contract without full payment of the professional fees.

[24] Therefore, I am of the considered opinion that this application is not statute-barred under s. 6 of the Limitation Act 1953.

[25] The next objection is raised by the third respondent, that this application is time-barred by s. 126 of the LPA 1976. Section 126(1) states:

> 126. An order for taxation of costs to be made within 6 months of delivery of bill of costs.
>
> (1) An order for the taxation of a bill delivered by any advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the advocate and solicitors, at any time within six months from the delivery of the bill, or, **by the advocate and solicitor after the expiration of one calendar month, and within a year from, the deliver**. (emphasis added)

[26] This provision clearly states that an advocate and solicitor may apply for the taxation of the bill after the expiration of one calendar month, and within a year from the delivery of the bill of cost.

[27] In this case, the applicant has delivered the bill to the respondents on 16 March 2012. Thus, the third respondent submits that the one year period ended on 15 March 2013 for the applicant to apply for an order of taxation. Since this application was only filed on 21 November 2016, this application is time-barred under s. 126(1) of the LPA 1976.

[28] However, I am of the considered opinion and I agree with the applicant that the factual matrix of this case falls within s. 126(3) and not under s. 126(1) of the LPA 1976. Section 126 allows interested parties to apply for an order for the taxation of a bill of cost. This is when the parties cannot agree to the amount in the bills. But s. 126(3) provides that where an advocate and solicitor and his client consent to a taxation of a solicitor's bill, the Registrar may proceed to tax the bill notwithstanding that there is no order therefor.

[29] In this case, *vide* the letter dated 2 April 2012, the respondents have requested for the "taxation of the said bills pursuant to s. 126(3) of the Legal Profession Act 1976, thus negating the necessity to obtain an order of court for that purpose." Since the respondents have agreed to the taxation of the bills under s. 126(3), they now cannot object to the same by seeking refuge under s. 126(1) and submits that this application is time-barred.

[30] As such, since the third respondent had consented to the taxation of the bills under s. 126(3) of the LPA 1976, the third respondent is now estopped from raising an objection under s. 126(1) of the LPA 1976. In *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565, the Federal Court held at p. 583 with regards to the doctrine of estoppels:

> In the context of litigation, it usually arises where a party to an action has at least two alternative and mutually exclusive courses open to him. If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course.

[31] In the premise, the application is allowed with cost to be paid by the first and the second defendants.